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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-3

CURTIS PARHAM,

Appellant,

versus

ELLIS FRANKLIN HUGHES,

Appellee.

On Appeal from the
Supreme Court of The State of Georgia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The Opinion of the Supreme Court of Georgia is reported at *241 Ga. 198*. The unofficial citation is not available at this point. A copy of the Opinion of the Supreme Court of Georgia is attached hereto and identified as Appendix "A".

JURISDICTION

Jurisdiction in this Court is invoked pursuant to *28 United States Code 1257(2)* since there is drawn in question the validity of a state statute contended to be

repugnant to the United States Constitution and the decision of the Georgia Supreme Court was in favor of the validity of that statute. The trial court below concluded that the statute in question, Georgia Wrongful Death Statute, *Georgia Code Annotated* §105-1307, was repugnant to the Due Process and Equal Protection Clauses of the *5th* and *14th Amendments* to the *United States Constitution*. The trial court concluded that the statute violated the Due Process and Equal Protection Clauses of the United States Constitution by allowing the mother of an illegitimate child to sue for the wrongful death of that child while denying that right to the father of the illegitimate child. A copy of the trial court's Opinion is attached hereto and identified as Appendix "B".

The Georgia Supreme Court reversed the decision of the trial court, upholding the validity of the Georgia Wrongful Death Statute and concluded that it did not constitute a denial of equal protection or violation of due process by allowing the mother of an illegitimate child to sue for its wrongful death and denying that right to the father even in cases like the present one where the natural mother was deceased and the natural father had supported the child from its birth until its death, acknowledged the child by the execution of its Birth Certificate and maintained constant contact with the child through almost daily visitation from its birth until its death.

The Opinion of the Georgia Supreme Court from which this appeal is taken is dated April 4, 1978, and was entered on the 4th day of April, 1978. A Motion for Rehearing in the matter was filed on April 12, 1978, and the Motion for Rehearing was denied on April 19,

1978. A copy of the Denial of the Motion for Rehearing is attached hereto and identified as Appendix "C".

A Notice of Appeal was filed on the 28th day of April, 1978, in the Supreme Court of Georgia. A copy of said Notice of Appeal is attached hereto and identified as Appendix "D".

As mentioned previously, the statutory provision conferring jurisdiction on this Court is 28 *United States Code* 1257(2) since the case involves the question of the validity of a state statute challenged as being repugnant to the *Constitution* of the United States and the Decision of the Georgia Supreme Court was in favor of the validity of this statute.

For cases which sustain this Court's jurisdiction in this matter, see: *Glona v. American Guaranty & Liability Insurance Company*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 63 (1968); *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Trimble v. Gordon*, 97 S.Ct. 1459 (1977); *Gomez v. Perez*, 409 U.S. 535 and *Frontiero v. Richardson*, 411 U.S. 677 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A.

The case involves the Due Process and Equal Protection Clauses of the *5th* and *14th Amendments* to the *United States Constitution*.

B.

The case also involves *Georgia Code Annotated* 105-1307, which states:

> *105-1307 Homicide of child.*
>
> "A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother the illegitimacy of the child shall be no bar to a recovery.

C.

The case incidentally involved *Georgia Code Annotated* 74-202, which imposes the primary support obligation for an illegitimate child on the father of that child and states:

> *74-202 Father's obligation to support.*
>
> "The father of an illegitimate child shall be bound to maintain him until said child reaches the age of eighteen, marries or becomes self-supporting, whichever occurs first. The obligation shall be good consideration to support a contract by him. He may voluntarily discharge this duty; if he shall fail or refuse to do it the law will compel him: provided however, that the Superior Court shall have

> the power, upon petition of the father to require the mother of an illegitimate child to contribute to such support upon a determination that the financial circumstances of both the father and the mother are such that justice and equity require the mother to share in or have responsibility for such support."

QUESTIONS PRESENTED

WHETHER GEORGIA CODE ANNOTATED §105-1307 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS BY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENYING THAT RIGHT TO THE FATHER OF AN ILLEGITIMATE CHILD WHERE:

1) THE NATURAL MOTHER OF THE CHILD IS DECEASED;

2) THE FATHER OF THE ILLEGITIMATE CHILD ACKNOWLEDGED HIS PATERNITY OF SAID CHILD BY EXECUTION OF THE CHILD'S BIRTH CERTIFICATE, SUPPORTED THE CHILD FROM ITS BIRTH UNTIL ITS DEATH, MAINTAINED CHARGE ACCOUNTS AT GROCERY STORES FOR THE ADDITIONAL SUPPORT OF SAID CHILD AND VISITED WITH THE CHILD ON ALMOST A DAILY BASIS FROM ITS BIRTH UNTIL ITS DEATH;

3) THE PRIMARY SUPPORT OBLIGATION FOR AN ILLEGITIMATE CHILD IS PLACED UPON THE FATHER OF THAT CHILD AND THE FATHER HAS, IN FACT, COMPLIED WITH THAT SUPPORT OBLIGATION.

II.

WHETHER THERE ARE LEGITIMATE STATE INTERESTS WHICH JUSTIFY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO SUE FOR ITS WRONGFUL DEATH AND DENYING THAT RIGHT TO THE FATHER OF SAID CHILD AND WHETHER GEORGIA CODE ANNOTATED 105-1307 PROMOTES ANY LEGITIMATE STATE INTERESTS WHICH MAY EXIST.

III.

WHETHER THE GEORGIA WRONGFUL DEATH STATUTE WHICH ALLOWS THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENIES THAT RIGHT TO THE FATHER CONSTITUTES IMPERMISSIBLE DISCRIMINATION BASED ON SEX.

STATEMENT OF THE CASE

(A) Statement of the Facts:

The Appellant herein was the natural father of Lemuel Parham, a minor child, who was killed in an automobile accident (R-25). The child's natural

mother, Cassandra Moreen, was killed in the same accident (R-25). While Appellant and his child's natural mother were never married, the Appellant signed the child's Birth Certificate acknowledging his paternity, (R-24), and the child utilized Appellant's name (Parham), as opposed to the natural mother's name (Moreen).

In addition, it was established without contradiction and adopted as Findings of Fact by the trial court that the Appellant paid the birth expenses for his minor child and supported his minor child from its birth until its death (R-23). It was established without contradiction and made a part of the trial court's Order, that the Appellant had, at all times, acknowledged the child as his own and was, at all times, acknowledged by the child as its father; and in addition to paying child support the Appellant maintained and paid charge accounts at grocery stores for food and other necessities to insure the support of this child and that the Appellant visited regularly with the child and, in fact, saw him every day and every weekend and had the child with him for many complete weekends (R-23).

All of the preceding facts were adopted as Findings of Fact by the trial court as revealed in the Order of the trial court attached hereto and identified as Appendix "B".

Following the death of his minor child in an automobile accident which also claimed the life of the child's mother, Appellant filed this original action seeking to recover for the wrongful death of his minor child in the Superior Court of Richmond County,

Georgia, on February 7, 1977, naming the Appellee herein as defendant and charging said Appellee with negligence in the death of his minor child and seeking to recover for that death (R-3 through 6). An explanation of the proceedings which account for the present status of the case is contained below.

(B) The Proceedings Below - How the Federal Questions Were Raised and Decided:

As stated above, the Appellant filed this original complaint seeking to recover for the wrongful death of his child on February 7, 1977. The defendant, Appellee herein, filed his responsive pleadings to the complaint (R-8 through 9). The Appellee herein then filed a Motion for Summary Judgment against the Appellant contending that *Georgia Code Annotated* §105-1307 prevented the appellant from recovering for the wrongful death of his illegitimate child. *Georgia Code Annotated* §105-1307 (1887 Georgia Laws, 43, 45; 1952 Georgia Laws, 54) provides:

> "A mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother, the illegitimacy of the child shall be no bar to a recovery."

Appellee relied on this statutory provision which allows the mother of an illegitimate child to sue for its wrongful death but denies that right to the father (R-14).

The trial court, Superior Court of Richmond County, Georgia, denied Appellant's Motion for Summary Judgment (R-25 through 29, and Appendix "B"). In so doing, the court concluded that the Appellant herein was the proper party to maintain an action for the alleged wrongful death of his minor child and found *Georgia Code Annotated* §105-1307 to be in violation of the Due Process and Equal Protection Clauses of the United States Constitution. In its Order the court made Findings of Fact and Conclusions of Law. The Order is set forth in its entirety as Appendix "B" attached hereto. The court found the Georgia Wrongful Death Statute deficient in three regards. The court concluded:

1.

"To the extent that the Georgia Wrongful Death Statute conditions the right of either parent to sue for the wrongful death of its child upon the legitimacy or illegitimacy of the child, that Statute constitutes a denial of Equal Protection and Due Process within the meaning of the *5th* and *14th Amendments* to the *United States Constitution.*"

2.

"To the extent that the Georgia Wrongful Death Statute purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, that Statute constitutes a denial of Equal

Protection and Due Process in violation of the *5th* and *14th Amendments* to the *United States Constitution.*"

3.

"Where the state imposes the primary support obligation for illegitimate children upon the father of those children and where the father of an illegitimate child in fact has provided some level of support for that child and has acknowledged his paternity by execution of the birth certificate and has in every respect treated the child as his own, the State cannot constitutionally deny that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased."

The Court concluded in its Findings of Fact that although the Appellant, as the natural father of the deceased minor child, had never married the natural mother, that Appellant had executed the Birth Certificate acknowledging his paternity of the child and had paid the birth expenses for the birth of said child and had regularly supported the child from its birth until its death (See Appendix "B"). The Court further found that the Appellant had, at all times, acknowledged the child as his son and was at all times acknowledged by the child as his father, and that in addition to paying child support, the Appellant had maintained charge accounts at grocery stores for food and other necessities to further insure the support of this child and had visited regularly with the deceased minor child and, in fact, saw him virtually every day.

Following the Order of the trial court finding the Georgia Wrongful Death Statute in violation of the Due Process and Equal Protection Clauses of the United States Constitution, the Appellee herein was granted a Certificate of Immediate Review by the trial court (R-30). The Georgia Supreme Court granted the Appellee's Application for Interlocutory Appeal on October 13, 1977, (R-1). On April 4, 1978, the Georgia Supreme Court reversed the decision of the trial court, concluding that the Georgia Wrongful Death Statute does not violate the Due Process or Equal Protection Clauses of the United States Constitution. The Supreme Court failed to address the issue of sex-based discrimination, although that issue was raised and argued in Appellant's Brief (See Appendix "A"). In its decision the Georgia Supreme Court cited four allegedly valid state interests promoted by the classification in the Georgia Wrongful Death Statute which allows the mother to sue for the wrongful death of an illegitimate child but denies that right to the father. The Appellant respectfully submits that two of those asserted state interests have been rejected by this Court in recent decisions and the other two which center around insuring a standard of morality and promoting legitimate family relationships, cannot possibly be promoted by a classification which rewards one party to an illegitimate act and punishes the other. (For discussion of the Georgia Supreme Court's asserted state interests, see Appendix "A").

Following this decision by the Georgia Supreme Court, the Appellant herein's Motion for Rehearing was denied on April 19, 1978, (See Appendix "C"). On the 28th day of April, 1978, Appellant herein filed a

Notice of Appeal to the United States Supreme Court. Appeal was filed pursuant to 28 *United States Code* 1257(2) since the case draws into question the validity of a state statute on the grounds that it is repugnant to the United States Constitution and the Decision of the Georgia Supreme Court was in favor of the validity and constitutionality of that statute (Appendix "A". A copy of Appellant's Notice of Appeal is attached hereto and identified as Appendix "D".)

(C) **Why The Federal Questions Are Substantial:**

The Appellant contends that the State of Georgia cannot, consistent with the Due Process and Equal Protection Clauses of the United States Constitution, allow the natural mother of an illegitimate child to recover for the wrongful death of that child and deny that right to the father, especially where the natural mother is deceased and the natural father has acknowledged his paternity by executing the Birth Certificate, paid the birth expenses on the child, supported the child from its birth until its death, maintained charge accounts for the additional support of the child and visited with the child on virtually a daily basis from its birth until its death (R-23 through 27). The trial court agreed with Appellant (See Appendix "B"). The Georgia Supreme Court reversed asserting four valid state interests allegedly promoted by this classification (See Appendix "A"). The federal questions raised by this Appeal are substantial because two of the legitimate state interests asserted by the Georgia Supreme Court have been expressly rejected by this Court in recent decisions and the remaining two are absolutely not promoted and could

never be promoted by the classification existing in the statute.

Initially, there is the assertion by the Georgia Supreme Court that the state has a legitimate interest in forestalling potential problems of proof of paternity in wrongful death actions (See the Georgia Supreme Court Opinion, Appendix "A", pp. 3a-4a). With regard to problems of proof of paternity in illegitimacy cases this Court has stated in *Gomez v. Perez*, 409 U.S. 535 (1973):

> "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an inpenetrable barrier that works to shield otherwise invidious discrimination." (Page 539).

In the 1977 case of *Trimble v. Gordon*, 97 S.Ct. 1459 (1977), this Court stated:

> "Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."

Likewise Appellant submits that difficulties and problems of proving paternity does not justify the total denial of the legal relationship between a father and his illegitimate child, especially where that relationship existed in fact as documented in the present matter.

Finally, in discussing many of the decisions of the United States Supreme Court, the Fifth Circuit Court of Appeals, in the case of *Beaty v. Weinberger*, 478 F.2nd 300 (5th Cir. 1973), concluded:

> "What is significant about these cases is the Court's implicit, if not explicit, disavowment of the notion that difficulties of proof are a sufficient or indeed rational basis for discriminating against illegitimates."

With regard to proving paternity, the Fifth Circuit goes on to say:

> "That problem, however, concerns burden of proof. Plainly the problem of proving parentage was viewed as a procedural matter which, of itself, was not sufficient justification for the state to formulate classifications between legitimates and illegitimates based upon it."

While it may be somewhat more difficult to establish paternity than maternity for an illegitimate child, Appellant respectfully submits that the difficulty does not warrant totally excluding one natural parent from benefits granted to another natural parent based on illegitimacy. As this Court suggested in *Trimble v. Gordon*, supra:

> "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their father's estates than required either for illegitimate children claiming un-

> der their mother's estates or for legitimate children generally." (Page 1465)

Secondly, the Georgia Supreme Court justified its Opinion by reasoning that the state had an interest in encouraging the fathers of illegitimate children to take steps to legitimate the children and that the Appellant in the present matter had the option of legitimating the child but failed to do so. In the first instance, the Court fails to explain why the state does not have a policy of encouraging mothers to legitimate illegitimate children and why therefore mothers of illegitimate children are allowed to bring actions for wrongful death without regard to legitimation. No justification is given for placing the entire responsibility for legitimation upon the father. More importantly, this Court has stated in a very recent decision, that a statute in violation of the Equal Protection Clause cannot be salvaged by the fact that alternatives exist which would allow one to avoid the impact of the unconstitutionality of the statute. In the 1977 case of *Trimble v. Gordon*, supra, this Court ruled that Illinois could not, consistent with the Equal Protection Clause, deny an illegitimate child the right to inherit by intestate succession from its father when it could so inherit from its mother.

The Illinois Supreme Court in *Trimble v. Gordon*, supra, had argued that the father of the illegitimate child could have left a Will, could have legitimated the daughter by marrying the mother and could have given the daughter the status of a legitimate child by stating in his acknowledgement of paternity, his desire to legitimate her. This is precisely the position

taken by the Georgia Supreme Court in the present matter. This Court rejected these contentions and concluded:

> "By focusing on the steps that an intestate might have taken to insure some inheritance for his illegitimate children, the analysis loses sight of the essential questions: the constitutionality of discrimination against illegitimates in a state intestate succession law. If a decedent had written a Will devising property to his illegitimate child, the case no longer would involve intestate succession law at all. Similarly, if the decedent had legitimated the child by marrying the child's mother or by complying with the requirements of some other method of legitimation, the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by hypothetical reshuffling of the facts." (Page 1467)

The Court went on to conclude:

> "Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances."

This Court has made it abundantly clear that the presence or absence of alternatives for avoiding the

impact of statutes challenged on equal protection grounds is immaterial. Consequently, in the present case the fact that the Appellant could have legitimated the child is of no consequence in deciding the constitutional validity of this challenged provision. As the Supreme Court stated in *Stanley v. Illinois*, 405 U.S. 645 (1972):

> "At the outset, we reject any suggestion that we need not consider the propriety of the dependency proceedings that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone." (Page 647)

The final two legitimate state interests asserted by the Georgia Supreme Court have generally been considered valid state interests justifying certain classifications. The Georgia Supreme Court concluded that the State of Georgia has a legitimate interest in promoting legitimate family relationships and in setting a standard of morality (See the Georgia Supreme Court Opinion, Appendix "A", p. 4a). No one would contend that these are not worthy state interests. However, the Georgia Supreme Court totally fails to demonstrate how legitimate family relationships and

high standards of morality are promoted by allowing one party to the illegitimate act to recover for the wrongful death of the child, which was the product of that act, and denying that right to the other party to the illegitimate act. Is the State of Georgia's interests in promoting legitimate family relationships and high standards of morality limited to punishing males who participate in these illegitimate acts, while rewarding the females who participate by allowing the latter to recover and denying that right to the former?

In addition, as Justice Hill stated in his dissenting Opinion in the Georgia Supreme Court, attached hereto and identified as Appendix "E":

> "The majority fails to explain how the state's objective of promoting a legitimate family unit is furthered by denying the father of an illegitimate child an action for that child's wrongful death. The illegitimate child is already dead by the time the means chosen by the state comes into operation. The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed. The sanction adopted by the state is not suited and comes too late to motivate a father to provide care for his illegitimate child. It treats the father of an illegitimate child different from the mother of that same child and thus constitutes a denial of equal protection."

Appellant respectfully submits that for the foregoing reasons the federal questions presented by the

present appeal are substantial. This Appellant is before this Court as a father who had a documented relationship with his son which was as continuous and real and strong as the relationship of any legitimate father/child relationship. Despite the presence of a meaningful father/son relationship and an obvious loss, this father is denied the right to bring an action for the wrongful death of his son because the child was illegitimate while the child's mother is expressly given the right to bring that action. The Georgia Supreme Court has denied this natural father the right to recover for the death of his child even though the natural mother is deceased and even though the Appellant has continuously acknowledged and supported this child from its birth until its death. Appellant respectfully submits that *Georgia Code Annotated* 105-1307 is in violation of the Equal Protection and Due Process Clauses of the United States Constitution and constitutes sex-based discrimination.

DISCUSSION OF QUESTIONS PRESENTED

I.

WHETHER GEORGIA CODE ANNOTATED §105-1307 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS BY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENYING THAT RIGHT TO THE FATHER OF AN ILLEGITIMATE CHILD WHERE:

1) THE NATURAL MOTHER OF THE CHILD IS DECEASED;

2) THE FATHER OF THE ILLEGITIMATE CHILD ACKNOWLEDGED HIS PATERNITY OF SAID CHILD BY EXECUTION OF THE CHILD'S BIRTH CERTIFICATE, SUPPORTED THE CHILD FROM ITS BIRTH UNTIL ITS DEATH, MAINTAINED CHARGE ACCOUNTS AT GROCERY STORES FOR THE ADDITIONAL SUPPORT OF SAID CHILD AND VISITED WITH THE CHILD ON ALMOST A DAILY BASIS FROM ITS BIRTH UNTIL ITS DEATH;

3) THE PRIMARY SUPPORT OBLIGATION FOR AN ILLEGITIMATE CHILD IS PLACED UPON THE FATHER OF THAT CHILD AND THE FATHER HAS, IN FACT, COMPLIED WITH THAT SUPPORT OBLIGATION.

The trial court, in its Findings of Fact and Conclusions of Law, made a determination that the State of Georgia imposes the primary support obligation for illegitimate children upon the father of these children (R-27, 28). The court was referring to *Georgia Code Annotated* §74-202, the text of which is set forth in an earlier portion of this Statement. That statute does indeed impose the primary support obligation for an illegitimate child on the father of that child. This position has also been sanctioned by the United States Supreme Court. See *Gomez v. Perez*, 409 U.S. 535 (1973). In addition, the Court below found that the father in this particular case, the Appellant herein, was in fact supporting the child, had acknowledged

the child since its birth, provided charge accounts in addition to regular support payments and visited with the child with an unusual degree of regularity (R-23 et seq). Based on the imposition of the primary support obligation upon the father and the actual support by the father in the present case, the trial court below concluded that the state cannot constitutionally deny the natural father of a child the right to sue for its wrongful death in these circumstances (R-28). The Georgia Supreme Court failed to address this contention and this portion of the trial court's Order in any regard.

The United States Supreme Court has considered the issue of classifications by states based on illegitimacy on numerous occasions. At the outset, Appellant submits that the present case is factually distinguishable from the most recent decision of this Court, *Quilloin v. Walcott*, United States Supreme Court Case No. 76-6372 (1978). In that case the Supreme Court refused to accord to the father of an illegitimate child the same veto powers for an adoption as are accorded to a divorced father. On the final page of this Court's Decision in that case, Mr. Justice Marshall stated:

> "Although Appellant was subject for the years prior to these proceedings to essentially the same child support obligation as a married father would have had, compare 74-202 with 74-105 and 30-301, he has never exercised actual or legal custody over his child and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child."

That factual situation is in marked contrast to the present situation, where the trial court found and the record reflects, that the present Appellant maintained a meaningful relationship with his child from the birth of that child until its death (R-23 through 27).

Appellant also refers the Court to the Decision of this Court in *Glona v. American Guaranty & Liability Insurance Company*, 391 U.S. 73 (1968). In that case this Court found the Illinois Wrongful Death Statute to be in violation of the United States Constitution. By construction of Louisiana courts, the Louisiana Statute had excluded both the mother and father of illegitimate children from bringing actions for the wrongful death of those children. The issue decided by the Court is best stated in the words of the Court in Footnote 3 of that Opinion:

> "... As the Court of Appeals noted, Article 2315 of the Louisiana Civil Code, providing the wrongful death recovery, gives a cause of action to 'the surviving father and mother of the deceased, or either of them ...' The statute does not state 'legitimate' father or 'legitimate' mother, but the Louisiana courts have held that a decedent must be legitimate in order for an ascendant or sibling to recover for his death."

In *Glona*, supra, this Court was confronted with an effort by the mother of an illegitimate child to bring an action for the wrongful death of that child. Appellant submits that the same reasoning used by the Court to allow the mother in that case to bring an action for the

wrongful death of her child applies to the Appellant in the present case. This Court concluded:

> "Yet we see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the 'sin,' which is, we are told, the historic reason for the creation of the disability. To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." (Page 74)

Appellant submits that *Glona*, supra, stands for the proposition that parents of illegitimate children may not be treated differently from parents of legitimate children consistent with the Equal Protection and Due Process Clauses of the United States Constitution.

This Court has stricken classification after classification based on illegitimacy. In *Levy v. Louisiana*, 391 U.S. 63 (1968), the Supreme Court awarded to illegitimate children the right to sue for the wrongful death of their mother. In *Trimble v. Gordon*,

97 S.Ct. 1459 (1977), this Court upheld an Equal Protection challenge to the Illinois Probate Act which allowed illegitimate children the right to inherit by intestate succession from their mothers but denied them the right of inheritance from their fathers. In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court ruled that the father of an illegitimate child has a protectable interest in his children. In *Gomez v. Perez*, 409 U.S. 535 (1973), the Supreme Court ruled that the father of an illegitimate child can be held responsible for the support of that child. In short, we have reached a point where an illegitimate child may recover for the wrongful death of its mother *(Levy)*; a mother may recover for the wrongful death of its illegitimate child *(Glona)*; an illegitimate child cannot be denied the right of inheritance from its father by intestate succession *(Trimble)*; the father of an illegitimate child can be held primarily responsible for its support (*Gomez* and *Ga. Code Ann.* §74-202); and the father of an illegitimate child is deemed to have protectable interests in his children *(Stanley)*. Each of these decisions was made on Equal Protection grounds. Appellant respectfully submits that the collective effect of these decisions demands a finding that the Georgia Wrongful Death Statute also violates the Equal Protection Clause of the United States Constitution. Appellant submits that the State might have concluded justifiably that there should be a difference in the right accorded children as the products of an illegitimate act, as opposed to the rights of the adults who are participants in that act. However, Appellant respectfully submits that there is no justification by which the State can assert the promotion of legitimate family relationships as a legitimate State interest and

thereby deny one party to an illegitimate act the right to recover for the wrongful death of the product of that act and yet award that right of recovery to the other participant in the same illegitimate act.

II.

WHETHER THERE ARE LEGITIMATE STATE INTERESTS WHICH JUSTIFY ALLOWING THE MOTHER OF AN ILLEGITIMATE CHILD TO SUE FOR ITS WRONGFUL DEATH AND DENYING THAT RIGHT TO THE FATHER OF SAID CHILD AND WHETHER GEORGIA CODE ANNOTATED 105-1307 PROMOTES ANY LEGITIMATE STATE INTERESTS WHICH MAY EXIST.

Note: Appellant has already thoroughly addressed this issue in that portion of this Jurisdictional Statement entitled "Why the Federal Questions Are Substantial". Appellant simply incorporates that analysis and the authority contained therein for the Court's consideration rather than to repeat that analysis and citation of authority.

III.

WHETHER THE GEORGIA WRONGFUL DEATH STATUTE WHICH ALLOWS THE MOTHER OF AN ILLEGITIMATE CHILD TO RECOVER FOR ITS WRONGFUL DEATH BUT DENIES THAT RIGHT TO THE FATHER CONSTITUTES IMPERMISSIBLE DISCRIMINATION BASED ON SEX.

In the case of *Frontiero v. Richardson*, 411 U.S. 677 (1973), the United States Supreme Court held that

classifications based upon sex, like those based upon race, alienage or national origin, are inherently suspect and must be subjected to strict judicial scrutiny. As previously illustrated, the State of Georgia imposes the primary support obligation for illegitimate children upon the fathers of those children. In addition, in this particular case the father of the child has actually supported the child and there was the actual existence of a father/son relationship (R-23). There is absolutely no justification under the present circumstances, for allowing the mother of an illegitimate child to bring an action for its wrongful death and denying that same right to the father.

Appellant devotes brief space to this argument at this point because the contentions which would support this argument have been incorporated into Questions I and II. However Appellant insists that the Georgia Statute, as it presently exists, does establish an exclusion based on sex which cannot survive the strict scrutiny required by the United States Supreme Court when a statute of this type is challenged on equal protection grounds. See: *Frontiero v. Richardson*, supra; and *Reed v. Reed*, 404 U.S. 71 (1971).

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that probable jurisdiction should be noted.

Respectfully submitted,

TISINGER, TISINGER &
VANCE
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Rob't D. Tisinger

Thomas E. Greer

202 Tanner Street
Post Office Box 798
Carrollton, Georgia 30117
404/834-4467

Attorneys for Appellant,
Curtis Parham.

CERTIFICATE OF SERVICE

GEORGIA, CARROLL COUNTY

I, Robert D. Tisinger, Counsel for the Appellant in the above styled action, do hereby certify that I have served three copies of the within and foregoing JURISDICTIONAL STATEMENT/ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA, upon:

A. Montague Miller, Esq.
Thomas W. Tucker, Esq.
Burnside, Dye, Miller & Bowen
Attorneys at Law
Post Office Box 2426
Augusta, GA 30903

[Attorneys for the Appellee, Ellis Franklin Hughes]

Joseph N. Anderson, Esq.
Gammon & Anderson
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Cedartown, GA 30125

[Attorneys for Estelle A. Moreen, Administratrix of the Estate of Lemuel Moreen Parham, Deceased Minor Child]

The above listed parties are all parties which the *Rules* of the U. S. Supreme Court require service, in compliance with Rule 33 of the *Rules of the United States Supreme Court* by depositing three true and correct copies of the same in the U. S. Mail, postage prepaid and properly addressed.

This the ____ day of June, 1978.

TISINGER, TISINGER &
VANCE
A PROFESSIONAL
CORPORATION

Rob't D. Tisinger

Attorneys for Appellant,
Curtis Parham.

APPENDIX A

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In the Supreme Court of Georgia.

Decided: APR. 14, 1978

33071. HUGHES v. PARHAM

NICHOLS, Chief Justice.

This case draws into question the constitutionality of Ga. Code Ann. § 105-1307 (Ga. L. 1887, pp. 43-45; 1952, p. 54) which provides as follows: "A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. *In suits by the mother the illegitimacy of the child shall be no bar to a recovery.* (Emphasis supplied.) The 1952 amendment inserted the last sentence relating to illegitimate children.

Upon the death of the illegitimate child, the natural father and the maternal grandmother, in her capacity as administratrix of the estate of the deceased child, brought separate wrongful death actions against the appellant. The appellant moved for summary judgment against the natural father, contending that there was no legal theory upon which the natural father could recover.

In denying the appellant's motion for summary judgment, the trial court found that Curtis Parham, the appellee, was the natural father of the deceased child; that the natural mother of the deceased child had been killed in the automobile collision that took the life of the child; that the child had been born out of wedlock to Curtis Parham, the appellee, and the deceased mother; and that although the appellee never had married the deceased mother, he had executed the child's birth certificate acknowledging paternity of the child, had paid the birth expenses for the child, had regularly supported the child from its birth until its death, had at all times acknowledged the child as his own, and had visited the child daily. The court further found that the Georgia wrongful death statute does not bar a wrongful death action by the mother of an illegitimate child. The trial court concluded as a matter of law that because the wrongful death statute allows a mother to maintain an action for the wrongful death of her illegitimate child but denies that right to the father of an illegitimate child, the statute violates the equal protection and due process clauses of the United States Constitution.

While the trial court's order cited no authority in support of its conclusion that the wrongful death statute is unconstitutional, we assume that it was persuaded by appellee's arguments that the United States Supreme Court's decisions outlawing arbitrary legislative classifications based upon illegitimacy mandated the result. Although a superficial consideration of the policies enunciated in those cases might lead one to the conclusion that the trial court has not erred, a close and detailed examination of the constitutional analysis employed in those decisions yields a different result.

1. With limited exception, the analysis used by the Supreme Court in illegitimacy cases appears to be grounded in equal protection. See Levy v. Louisiana, 391 US 68 (88 SC 1509) (1968); Glona v. American Guarantee and Liability Insurance Company et al., 391 US 73 (88 SC 1515) (1968); Stanley v. Illinois, 405 US 645 (92 SC 1208) (1972); Webber v. Aetna Casualty and Surety Company, 406 US 164 (92 SC 1400) (1972); Gomez v. Perez, 409 US 535 (93 SC 872) (1973); New Jersey Welfare Rights Organization et al. v. Cahill, 411 US 619 (93 SC 1700) (1973); Jimenez v. Weinberger, 417 US 628 (94 SC 2496) (1974); Mathews v. Lucas, 427 US 495 (96 SC 2755) (1976); Fiallo v. Bell, ___ US ___, (97 SC 1473) (1977); Trimble v. Gordon et al., ___ US ___ (97 SC 1459) (1977); and Quilloin v. Walcott, ___ US ___, (98 SC 549) (1978).

The equal protection test focuses on whether the "ends" to be reached by the governmental classification are legitimate and whether the means employed to achieve those ends are substantially related to them, i.e., whether the exclusion of fathers of illegitimate children from the benefits of a wrongful death action is substantially related to legitimate state interests. The equal protection test is further complicated by the addition of differing standards of scrutiny depending upon the area being examined. Strict scrutiny is utilized for those areas of suspect classifications where discrimination against a particular class has traditionally existed or where paramount constitutional rights are abridged. In contradistinction to this strict scrutiny standard, a less stringent standard is used where economic or business interests are classified by the state.

The means used in the case sub judice is obviously the denial by the General Assembly of an action for wrongful death to the father of an illegitimate child. The ends, however, are not so readily discernible. The state ends might be the interests in promoting a legitimate family unit and in forestalling potential problems of proof of paternity in wrongful death actions. The promotion of this state interest might have been the result of the conclusion of the General Assembly that more often than not the father of an illegitimate child who has elected neither to marry the mother nor to legitimate the child pursuant to proper legal proceedings suffers no real loss from the child's wrongful death. Finally, the General Assembly may have decided that the state's interest in setting a standard of morality was enhanced by refusing to allow a natural father, who has refused to comport with the General Assembly's idea that society needs a legitimate family unit, to share in a statutorily given wrongful death action.

In upholding Social Security law provisions which required illegitimate dependents in certain situations to submit individualized proof of dependency against attacks based upon the equal protection clause, Justice Blackmun held that "Congress is [not] required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately 'spent', ignoring the relative amounts devoted to administrative rather than welfare uses . . . While the scrutiny by which their showing is to be judged is not a toothless one, the burden remains upon the appellees [plaintiffs] to demonstrate the insubstantiality of that relation."

Mathews v. Lucas, 427 U.S. at 510. Justice Blackmun's statement illustrates that the standard of scrutiny used when reviewing legislative classifications placed upon illegitimates is somewhat less than "strict scrutiny." Unfortunately, the standard enunciated by Justice Blackmun can only serve as a starting point for deciding which standard of analysis should be employed here. That standard of scrutiny is a direct result of the highest court's concern with the traditional discrimination against the illegitimate child itself. "As we said in *Lucas*, the constitutionality of this law 'depends upon the character of the discrimination and its relation to legitimate state aims. . . .' In subsequent decisions, we have expressly considered and rejected the argument that a state may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." Trimble v. Gordon, 97 SC at 1464-1465.

Here, the classification has been placed upon the parent of an illegitimate child. We can find no Supreme Court cases which suggest that a stronger than ordinary level of scrutiny should be employed when the object of the classification is the father of an illegitimate child. We do not think that Stanley, supra, and Quilloin, supra, mandate a different conclusion. Those decisions were concerned with the forced loss of parental rights by state proceedings. The Supreme Court's concern in those cases rested not with any traditional discrimination against fathers of illegitimate children, but rather, with the potential state infringement without proper hearing upon the fundamental right of an individual to raise a family.

2. The Georgia wrongful death statute does not violate the equal protection clause of the United States Constitution. All of the four ends proffered by this court as reasons for the legislative classification are legitimate state interests. Applying a normal level of scrutiny to the legislative classification compels a finding that the means employed to attain those legitimate ends are not unconstitutional in violation of the equal protection clause. "[C]lassifications are not *per se* unconstitutional; the matter depends upon the character of the discrimination and its relation to the legitimate legislative aims." Mathews v. Lucas, 427 US at 504. "[P]resumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case by case adjudication would show, are permissible under the Fifth Amendment so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny . . . [T]he burden remains upon the [parties arguing unconstitutionality] to show the insubstantiality of that relation." Mathews v. Lucas, 427 U. S. at 509.

3. This court recognizes that Glona v. American Guarantee and Liability Insurance Company et al., supra, stands as a physical precedent for the propositions proffered by the appellee. That case, however, can be distinguished on its facts. The problems of proving maternity in Glona would be insignificant in comparison to the problems of proving paternity in the usual case. Further, the State has a legitimate interest in encouraging fathers of illegitimate children to legitimate the child by petition

or by marrying the mother. This court recognized in Quilloin, supra, that in most circumstances it is the mother, not the father, who raises and cares for the illegitimate child. Moreover, the father of the illegitimate child is usually the parent in this situation who has control over whether a legitimate family unit will exist. Thus, the state interest in promoting the family as an institution for child rearing and in setting standards of morality are arguably furthered by denying the wrongful death action to fathers of illegitimate children, although granting it to mothers.

If the facts as alleged in the father's affidavit and as found by the trial court in this case are true, he has indeed suffered and arguably should be entitled to bring a wrongful death action for the loss of his child. The remedy, however, lies with the General Assembly, not with the judiciary.

The right to bring a wrongful death action did not exist under common law. It is statutorily given. The Supreme Court of the United States has held many times that it is not unconstitutional for a state legislature to attack a perceived evil only a little at a time. In 1952 the General Assembly did this by adding the portion of Code Ann. § 105-1307 which provides that the illegitimacy of a child shall be no bar to recovery in a suit by the mother. Ga. L. 1952, p. 54. In 1979 the General Assembly could choose to amend the act to allow the father of an illegitimate child to bring a wrongful death action. The Constitution, however, does not require that this court do so.

4. The trial court also found that the wrongful death action violated the appellee's due process rights. This court concludes to the contrary.

5. For the reasons set out above, the trial court erred in finding Code Ann. § 105-1307 unconstitutional in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Judgment reversed. All the Justices concur, except Hill, J., who dissents.

APPENDIX B

IN THE SUPERIOR COURT
FOR THE COUNTY OF RICHMOND
STATE OF GEORGIA

CURTIS PARHAM,
Plaintiff

versus
Civil Action
File No. 5643-C

ELLIS FRANKLIN HUGHES,
Defendant

ORDER

The defendant, Ellis Franklin Hughes, having filed a motion for summary judgment in the case styled

above, and the same having come on for hearing on September 1st, 1977, and both parties having been represented by counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.

Curtis Parham is the natural father of Lemuel Parham, deceased, said minor child having been killed in an automobile accident on or about December 30, 1976.

2.

That the natural mother of said minor child, Cassandra Moreen, was killed in the same accident which claimed the life of the minor child, Lemuel Parham.

3.

That the deceased minor child Lemuel Parham was an illegitimate child, having been born to Curtis Parham and Cassandra Moreen, out of wedlock.

4.

That although Curtis Parham, the natural father of the child, never married Cassandra Moreen, the natural mother of said child, Curtis Parham did execute the birth certificate acknowledging paternity of the child. In addition, Curtis Parham paid the birth ex-

penses for the birth of Lemuel Parham and had regularly supported said child from its birth until its death.

5.

That Curtis Parham at all times acknowledged the child as his son and was at all times acknowledged by the child as his father and in addition to paying child support, Curtis Parham maintained charge accounts at grocery stores for food and other necessities to further insure the support of his child.

6.

That Curtis Parham visited regularly with the deceased child and in fact saw him virtually every day and had the child with him on many weekends.

7.

That following the death of the minor child and the natural mother of the minor child in the collision identified herein, Curtis Parham instituted an action in the Superior Court of Richmond County, State of Georgia, for the wrongful death of the illegitimate child Lemuel Parham, asserting his rights to recover for the wrongful death of said child.

8.

That almost simultaneously, Estelle A. Moreen, maternal grandmother of the deceased minor child, in

her capacity as Administratrix of the Estate of Lemuel Parham, filed an identical action seeking to recover for the wrongful death of the minor child.

9.

That following the institution of the two actions for wrongful death identified above, Ellis Franklin Hughes, defendant in both actions, filed this motion for summary judgement against Curtis Parham contending that the plaintiff Curtis Parham was prohibited by law from bringing a wrongful death action for the death of his illegitimate son.

10.

That the Georgia Wrongful Death Statute presently provides that illegitimacy of the deceased child is not a bar to an action for wrongful death by the mother of said child. (See: Georgia Code Annotated §105-1307).

11.

That the Georgia Legislature has placed primary responsibility for the support of illegitimate children upon the fathers of said children. (See: Georgia Code Annotated §74-202).

CONCLUSIONS OF LAW

1.

To the extent that the Georgia Wrongful Death Statute conditions the right of either parent to sue for the wrongful death of its child upon the legitimacy or il-

legitimacy of the child, that Statute constitutes a denial of equal protection and due process within the meaning of the 5th and 14th Amendments to the United States Constitution.

2.

To the extent that the Georgia Wrongful Death Statute purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, that Statute constitutes a denial of equal protection and due process in violation of the 5th and 14th Amendments to the United States Constitution.

3.

Where the state imposes the primary support obligation for illegitimate children upon the father of those children and where the father of an illegitimate child in fact has provided some level of support for that child and has acknowledged his paternity by execution of the birth certificate and has in every respect treated the child as his own, the State cannot constitutionally deny that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased.

4.

The Court finds that Curtis Parham, natural father of the deceased illegitimate child Lemuel Parham, who has since the child's birth acknowledged his

paternity, provided a level of support for said child and exercised extensive visitation with said child, is the proper person to maintain an action for the wrongful death of said minor child.

Based upon the foregoing Findings of Fact and Conclusions of Law, the motion for summary judgment filed by the defendant Ellis Franklin Hughes against the plaintiff, Curtis Parham, is hereby DENIED.

This the 13th day of September, 1977.

/s/ FRANKLIN H. PIERCE
FRANKLIN H. PIERCE
Judge, Richmond Superior Court
State of Georgia

APPENDIX C

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 4/19/78

The motion for a rehearing was denied today:
Case No. 33071, Hughes v. Parham

Hill, J., dissents.

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX D

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

ELLIS FRANKLIN HUGHES,
Appellant

versus

Civil Action
File No. 33071

CURTIS PARHAM,
Appellee.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Curtis Parham, the Appellee above named, hereby appeals to the Supreme Court of the United States from the Final Order of the Supreme Court for the State of Georgia upholding the validity of a Georgia Statute which had been found by the trial court to be repugnant to the Constitution of the United States, to-wit:

> The Supreme Court of the State of Georgia reversed a decision of the Superior Court of Richmond County, Georgia, which had sustained attacks on the Georgia Wrongful Death Statute made pursuant to the Equal Protection and Due Process Clauses of the United States Constitution and finding that Statute in violation of the Due Process and Equal Protection Clauses of the United States Constitution to

> the extent that it (a) conditioned the right of either parent to sue for the wrongful death of its child upon the legitimacy or illegitimacy of the child, (b) purports to allow the mother of an illegitimate child to maintain an action for the wrongful death of that child and denies that right to the father of an illegitimate child, (c) imposes the primary support obligation for illegitimate children upon the father of those children and then where the father of an illegitimate child has, in fact, provided a level of support for that child, has acknowledged its paternity by execution of the birth certificate and has, in every respect, treated the child as his own, denies that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased.

The Supreme Court for the State of Georgia reversed the Order of the Superior Court of Richmond County, Georgia, upholding the validity of the Georgia Wrongful Death Statute; which the trial court had held to be repugnant to the Constitution of the United States.

The decision of the Supreme Court for the State of Georgia, which is the subject of this Appeal, was entered on the 4th day of April, 1978. An Order denying Motion for Rehearing was entered on April 19, 1978.

This Appeal is taken pursuant to *28 United States Code 1257 (2)*.

Respectfully submitted,

TISINGER, TISINGER & VANCE
A PROFESSIONAL CORPORATION

/s/ ROBERT D. TISINGER
Rob't D. Tisinger

/s/ THOMAS E. GREER
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Attorneys for Appellee,
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CERTIFICATE OF SERVICE

I, Thomas E. Greer, Counsel for the Appellee in the above styled action, do hereby certify that I have served a copy of the within and foregoing NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT upon:

A. Montague Miller, Esq.
Thomas W. Tucker, Esq.
Burnside, Dye, Miller & Bowen
Attorneys at Law
Post Office Box 2426
Augusta, GA 30903

(Attorneys for the Appellant,
Ellis Franklin Hughes)

Joseph N. Anderson, Esq.
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Cedartown, GA 30125

(Attorneys for Estelle A. Moreen,
Administratrix of the Estate of
Lemuel Moreen Parham, Deceased
Minor Child)

The above listed parties are all parties which the *Rules* of the United States Supreme Court require service in compliance with *Rule 33* of the *Rules* of the United States Supreme Court by depositing a true and correct copy of the same in the United States Mail,

properly addressed, and with sufficient postage affixed thereon.

This the 26th day of April, 1978.

/s/ THOMAS E. GREER
Thomas E. Greer
(Attorney for the
Appellee, Curtis Parham)

APPENDIX E

In the Supreme Court of Georgia

33071. HUGHES v. PARHAM

HILL, Justice, dissenting.

The majority falls to explain how the state's objective of promoting a legitimate family unit is furthered by denying the father of an illegitimate child an action for that child's wrongful death. The illegitimate child is already dead by the time the means chosen by the state comes into operation. The denial of a claim for a child's wrongful death does not promote the family as an institution for rearing that child in a timely or rational manner regardless of the level of scrutiny employed. The sanction adopted by the state is not suited and comes too late to motivate a father to provide care for his illegitimate child. It treats the father of an illegitimate child different from the

mother of that same child and thus constitutes a denial of equal protection.

The majority seek to distinguish Glona v. American Guarantee and Liability Ins. Co., supra, based on the difference in proving paternity vs. maternity, a ground which was expressly rejected in Trimble v. Gordon, supra, where the Court stated that although a state might adopt a more demanding standard of proof for fathers of illegitimate children than for mothers, the extreme means of complete exclusion of recovery was not permissible. Because I cannot accept at face value the tortfeasor's proffered state rationale or a distinction of Glona already rejected by the U. S. Supreme Court, I must respectfully dissent.